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Office of Administrative Law Judges
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Issue Date: 20 November 2003

In the Matter of

MARY A. BESSARA

Claimant

Case No.: 2003 LHC 621

v.

NAVY MWR/
CONTRACT CLAIMS SERVICES, INC.

Employer/Carrier

OWCP No.: 15-41449

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS

Party in Interest

Appearances:

Mr. Steven M. Birnbaum, Attorney
For the Claimant

Mr. Robert C. Kessner, Attorney
For the Employer/Insurer

Before:

Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER-
AWARD OF PERMANENT TOTAL DISABILITY COMPENSATION

This case involves a claim filed by Ms. Mary Alice Bessara for disability and medical benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950, as amended ("the Act"), as made applicable by the NonAppropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171 to 8173. In November 2002, through counsel, Ms. Bessara filed a pre-hearing statement seeking temporary disability compensation and medical care for an injury she suffered while working for Navy MWR ("the Employer"). On December 12, 2002, the District Director forwarded the pre-hearing statement to the Office of Administrative Law Judges. Pursuant to a Notice of Hearing, dated

January 29, 2003 (ALJ I),¹ I conducted a formal hearing on May 15, 2003 in Honolulu, Hawaii, attended by Ms. Bessara, Mr. Birnbaum, and Mr. Kessner. My decision in this case is based on the hearing testimony and all the documents admitted into evidence: CX 1 to CX 13 and EX 1 to EX 23.

Issue

Extent of disability as of July 21, 2002

Parties' Positions

Claimant²

In January 1997, Ms. Bessara severely injured her back working in the Employer's child care kitchen. Following some therapy, Ms. Bessara attempted, but was unable to return to work. Consequently, she started receiving temporary total disability compensation. Her disability is now permanent. In July 2002, based on a labor market survey, the Employer asserted Ms. Bessara was capable of returning to work and earning a wage of \$6.60 an hour, 40 hours a week.

Because Ms. Bessara has established that due to her injury she is not able to return to her former work in the kitchen, the Employer has the burden of demonstrating suitable alternative employment. The Employer has failed to carry that burden for two reasons. First, Ms. Bessara's treating physician, Dr. McCaffrey, believes she is unable to accomplish any work. In contrast, an examining physician, Dr. Ma, reached equivocal conclusions about her capacity for work. The labor market survey was developed in light of Dr. Ma's opinion without consideration of Dr. McCaffrey's restrictions, including Ms. Bessara's depression associated with her chronic pain syndrome. Second, to the extent Dr. Ma's assessment may show Ms. Bessara has some capacity for work, the labor market survey did not take into account the phased-in re-employment approach recommended by Dr. Ma.

Since Ms. Bessara is unable to return to employment, the extent of her permanent disability is total. As a result, Ms. Bessara seeks permanent total disability compensation from July 21, 2002, and continuing, plus attorney fees.

Employer³

¹ The following notations appear in this decision to identify specific evidence and other documents: ALJ - Administrative Law Judge exhibit, CX - Claimant exhibit, EX - Employer exhibit, and TR - Transcript of hearing.

²Post-hearing brief, dated September 1, 2003, and hearing presentation (TR, pages 12 to 14).

³Post-hearing brief, dated August 29, 2003.

Following an accident in January 1997, and after attempting to work, Ms. Bessara stopped working and began receiving weekly payments of \$249.84 from the Employer for temporary total disability. However, based on a labor market survey developed in January 2002 demonstrating the availability of suitable alternative employment in the form of light duty, part-time work for Ms. Bessara, the Employer reduced the weekly compensation to \$79.22 for her permanent partial disability starting July 21, 2002.

Dr. Ma, a board certified orthopedic surgeon, both examined Ms. Bessara and considered her case on at least three occasions between 1998 and October 2002. Based on his evaluations, Dr. Ma believed Ms. Bessara was capable of accomplishing the jobs listed in the labor market survey, which included child care and clerical, full-time and part-time work. Although Dr. McCaffrey has treated Ms. Bessara, he is not a board certified physician. He also deferred rendering an official opinion on the suitability of the work for Ms. Bessara pending a functional capacity evaluation. When the evaluation was conducted, Ms. Bessara claimed an inability to complete the requested tasks. In contrast, surveillance video indicates Ms. Bessara is capable of some physical activity. Additionally, Ms. Bessara has failed to mitigate the impact of her injury because she has gained weight and has not accomplished prescribed exercises.

The preponderance of the more probative medical evidence establishes that Ms. Bessara is capable of returning to light duty work. Since the labor market survey demonstrates the availability of such work, Ms. Bessara has a residual earning capacity. Consequently, as of July 21, 2002, the extent of her disability is partial, not total, and the appropriate weekly permanent partial disability compensation is \$79.22.

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issue.

For the Claimant

Sworn Testimony of Dr. Scott McCaffrey (TR, pages 14 to 80)

[Direct Examination] Dr. McCaffrey is Ms. Bessara's treating physician. Board certified in emergency medicine,⁴ Dr. McCaffrey presently works as an occupational physician. Although he is not certified in that area, Dr. McCaffrey has been practicing occupational medicine for 12 years. Dr. McCaffrey takes a conservative approach to occupational back problems based on a patient's clinical presentation by utilizing medication, hot/cold treatments and physical therapy to assist with muscular spasms, sleep disorders, and back pain. If the patient fails to respond within two to four weeks, then additional diagnostic tests, such as MRIs, are concluded to isolate and define the problem.

⁴See CX 5 and EX 18.

Dr. McCaffrey first treated Ms. Bessara in 1991 or 1992 for a back problem that was eventually resolved. On February 2, 1997, within two weeks of another back incident, Dr. McCaffrey treated Ms. Bessara for a back problem. At that time, she was struggling with low back pain on a level of 6 to 7 on a scale of 1 to 10. She described an aching, as well as a burning, sensation in her lumbar area, with bilateral leg aching discomfort. The pain had persisted for two weeks. Based on this presentation and a physical examination, Dr. McCaffrey diagnosed: a) acute low back strain with mild spasm, b) pre-existing lumbar disk syndrome with radiculopathy; and, c) chronic recurrent regional myofascial pain disorder, or body immobilization due to pain. She also had a bilateral patella form disorder that was pre-existing. Dr. McCaffrey did not take her off work. Instead, he hoped to resolve her problem while she remained productive. Due to her sensitivity, he prescribed non-steroidal anti-inflammatory medicine and a muscle relaxant. He also referred her for massage treatment and an x-ray study of L4-5. The back x-ray showed no demonstrable instability at L4-5.

Over the course of the next several months, Ms. Bessara made four or five failed attempts to return to work full duty; the Employer did not offer light duty. Each time, she was able to work for a week or two until a work activity, such as lifting a pan, caused her back pain to flare up and forced her off duty to rest.

Due to her failure to recover and complaints of shooting numbness in her legs suggestive of a pinched nerve, Dr. McCaffrey began a more aggressive diagnostic approach. An MRI, electromyogram, and a nerve conduction study, established that Ms. Bessara had a significant disk herniation at L4-5 with asymmetrical nerve encroachment on the left side. That finding was consistent with Ms. Bessara's clinical presentation. A more recent study from 2000 or 2001 established that the presence of spinal stenosis. In other words, the disk has continued to derange and now is impinging on the spinal chord.

Although Ms. Bessara has not undergone spinal surgery, Dr. Smith performed an inter-diskal electrothermal coagulation treatment. That procedure involves inserting a wire around the disk and then heating the wire to coagulate the protein in an attempt to solidify and stabilize the disk. The procedure was unsuccessful in that she did not obtain much pain relief.

When he initially treated her in 1997, Ms. Bessara was highly motivated to return to work. However, over the years, her drive has diminished due to factors secondary to her chronic pain. Dr. McCaffrey's present diagnosis is severe back pain and disorder, with a severe, uncorrectable structural problem. She has a disk herniation at L4-5, nerve impingement, and spinal stenosis. These problems have caused a loss of body functions, interfered with her sleep, and led to reactive depression. Her condition has deteriorated to the point that Ms. Bessara is "as bad as she's ever been." Although Dr. Smith and Dr. Ma have recommended back surgery, Ms. Bessara is reluctant to permit another procedure on her back. As a result, her recovery is stalled.

Dr. McCaffrey has treated Ms. Bessara at least one a month for the last five years and witnessed the deterioration of her condition. He has reviewed other medical evaluations of Ms. Bessara's condition and notes none of the doctors disagree with his assessment about the extent of

her condition. His long-term doctor-patient relationship with Ms. Bessara has enhanced Dr. McCaffrey's ability to make these observations. He continues to treat her conservatively with medication, including anti-depressants.

Due to her physical condition, Ms. Bessara is unable to return to either part-time or full-time work. She has very limited functional movement in her lumbar spine and experiences constant pain. Ms. Bessara is unable to sit for more than 15 to 30 minutes without having to shift around. She has a limited ability to walk and can go only about a block without resting. Mr. Bessara is incapable of sitting or standing for long periods of time.

Ms. Bessara took functional capacity evaluations in September 1999 (CX 8) and April 2002. After about 45 minutes of range of motion and strength tests, Ms. Bessara was unable to complete the 2002 examination due to pain.

Dr. McCaffrey has not viewed the surveillance films but stated he would not be surprised if the tapes showed Ms. Bessara able to do some walking, standing, and limited bending at the waist. She would have a limited ability to pick up leaves. Such an activity would not be inconsistent with chronic back pain. Her medications may enhance her ability to do that work. She could also carry light weight grocery bags.

In Dr. McCaffrey's opinion, Ms. Bessara is not capable of productive employment. He believes work in child care would be foolish since being around children places her at risk for exacerbating her back condition. Ultimately, Dr. McCaffrey recommends Ms. Bessara not work at all. Even part-time work is not suitable because she would be unable to maintain her focus long enough.

[Cross-examination] Dr. McCaffrey's board certification in emergency medicine has lapsed. He was also unable to pass the occupational medicine board examination. Dr. McCaffrey is in charge of Work Star Occupational Health. Although physician assistants conduct the initial examination of a patient, Dr. McCaffrey subsequently confirms the findings with the patient. About 50% of his work involves workers' compensation and Dr. McCaffrey is actively involved in making improvements in that area.

Prior to seeing Ms. Bessara in 1997, Dr. McCaffrey believes he had last seen her in 1992. Although Dr. McCaffrey did not review pre and post injury radiographic studies, he believes a radiologist observed a worsening of the structural derangement at L4-5 in the comparison. That worsening occurred in 2000 or 2001.

In 1997, his initial assessment was lumbar sprain. He suspected an underlying L4-5 disk to be part of the re-injury process. She had injured that disk in 1991 or 1992. Ms. Bessara she recovered clinically and was able to return to work without follow-up treatment. Once a disk suffers some damage, a weak spot exists in the spine. Consequently, Dr. McCaffrey believes Ms. Bessara's subsequent injury in 1997 worsened her spinal injury because she was not able to recover this time.

The physician who accomplished the EMG found a mild to moderate L4-5 radiculopathy with impingement of the nerve on the left side.

Dr. McCaffrey prefers to return patients to light duty first to preclude re-injury or a worsening of the condition. While he doesn't recall whether Ms. Bessara was ever offered light duty, Dr. McCaffrey is certain she did not have such an offer in the first year or two following her 1997 injury.

The recent loss of her husband has had a depressive effect on Ms. Bessara. At the same time, the depression Dr. McCaffrey identified has developed over the last three or four years.

Due to her constant pain, Ms. McCaffrey would have significant difficulty accomplishing any work, even sedentary employment, considering the requirement for extensive sitting. Dr. McCaffrey agrees with the principle that the mental aspect of work can be beneficial. But, realistically, that is not a productive approach for Ms. Bessara because she already tried to return to work.

Ms. Bessara's clinical presentation is not inconsistent with the objective medical evidence. She has not responded to years of treatment.

Dr. McCaffrey believes he reviewed three or four jobs submitted by a counselor. He found them unrealistic and inconsistent with Ms. Bessara's clinical condition. He doesn't remember whether he responded to the counselor in writing.

Deposition of Dr. McCaffrey
(EX 18)

In an April 2003 deposition, Dr. McCaffrey discussed his treatment of Ms. Bessara. When he first saw Ms. Bessara in February 1997 concerning the January 21, 1997 back injury, she had experienced a sudden severe pain in the lumbar area at work. Dr. McCaffrey observed that she was in significant discomfort with bilateral tenderness in the paraspinal muscles. Her spinal range of motion was limited and the leg lifts were positive.

Ms. Bessara had suffered an earlier back injury in August 1991. Prior to the January 1997 event, she had not suffered much back pain for a long time and did not experience any leg symptoms. As a result, Dr. McCaffrey diagnosed low back strain and aggravation of a pre-existing lumbar disc problem. He also found recurrent regional myofascial pain disorder; that is, her back muscles were attempting to keep her spine from moving. He prescribed a muscle relaxant, an anti-inflammatory, massage therapy, and a back x-ray.

For the next several months, a number of times, Dr. McCaffrey returned Ms. Bessara to work after periodic rest periods. She was able to work most of May and June 1997. However, in July and August 1997, Ms. Bessara experienced severe and growing pain due to her work activities. Finally,

on August 13, 1997, Dr. McCaffrey took Ms. Bessara off work with no return.

He last saw Ms. Bessara in the spring of 2003. At that time, her pain level remained 8 out of 10 and she suffered functional impairment. Dr. McCaffrey's diagnosis was L4-5 lumbar disc syndrome with L-5 radiculopathy; reactive depression; and, chronic pain syndrome. He noted that the most recent functional capacity evaluation was inconclusive because Ms. Bessara was unable to tolerate the evaluation.

Dr. McCaffrey has recommended back surgery to stabilize the area. However, Ms. Bessara has declined that procedure. At present, he is treating her back problem with maintenance medication and some home exercises. Ms. Bessara has indicated that she goes outside occasionally to water her plants. Her husband recently passed away and Ms. Bessara receives logistical support from her children.

Dr. McCaffrey reviewed Ms. Figueroa's assessment and list of jobs for Ms. Bessara. Strictly in terms of physical capacity, Dr. McCaffrey would limit Ms. Bessara's lifting to five pounds. He would not permit her to bend or stoop to pick up anything. Additionally, she has to be able to change her position if she is standing, walking, or sitting. However, in reality, considering her entire condition, and based on his long term treatment of Ms. Bessara, Dr. McCaffrey concluded she is incapable of productive employment. Noting that she spends most of her time in bed, Dr. McCaffrey stated her present endurance for any activity, or mixture of activities, is at best between one and two hours. After that period, Ms. Bessara would have to be able to lay down. Considering the chronic nature of her condition, Ms. Bessara is incapable of returning to work. Accordingly, Dr. McCaffrey opined that none of the jobs identified by Ms. Figueroa are suitable for Ms. Bessara.

Sworn Testimony of Ms. Mary A. Bessara
(TR, pages 81 to 115)

[Direct Examination] Ms. Bessara, age 65, was a cook at an MWR day care facility at the time of her injury in 1997. She hurt her back lifting a big pan. She experienced a "terrible pain" and fell down on her legs. Unable to complete the work day, Ms. Bessara went to an emergency room and then home. Some time later, she returned to work full time and made herself do the job despite the significant pain. The job required Ms. Bessara to lift heavy pans. She enjoyed her work and the children. Ms. Bessara had worked for the Navy since 1981, received periodic raises, and obtained satisfactory reviews and occasional incentive awards. She had no history of absences or late arrivals. Ms. Bessara wanted to work and intended to do so until she retired. She liked earning money. Because she has never driven a car, her husband drove her to work.

During the first year after her injury, Ms. Bessara had periods of non-work and work. Since the emergency room personnel told her to see a doctor, Ms. Bessara went to Dr. McCaffrey who had provided treatment for a previous back problem which had kept her out of work six months. Ms. Bessara insisted on working and Dr. McCaffrey did not impose any work restrictions. After her 1997 injury, she was not offered any light duty. Eventually, Ms. Bessara stopped working because she

could no longer stand the pain which reached a level of 10 out of 10.

Recently, Ms. Figueroa sent her a list of six jobs. She didn't contact the employers for several reasons. First, she would have to take the bus for all of them and she couldn't make it to the bus stop which was 15 minutes away. Second, since she stopped her schooling at the age of 15, Ms. Bessara believed she did not have the requisite education for working as a teacher assistant floater. Likewise, she does not have over a year of customer service experience. Third, Ms. Bessara did not think she could endure four hours of work and the required bus rides. Ms. Figueroa never evaluated Ms. Bessara. Dr. McCaffrey did not release her to either part, or full time work.

Ms. Bessara's lower back hurts all the time. The pain radiates down both legs and feels like pins and needles. On a good day, her pain level is 6 to 7. A bad day brings pain at the 9 to 10 level. Medication helps "somewhat, but nothing numbs the pain entirely." She can't sleep more than an hour and a half at night because she wakes up trying "to find a spot that doesn't hurt." Ms. Bessara experiences pain when bending over.

She also takes medicine for depression. Due to her depression, she is not interested in anything. She no longer cooks and has stopped being a good housekeeper. She is not interested in seeing a psychologist. Her children bring her food or she eats prepared meals. The children also shop for her. Sometimes she goes to the grocery store with her children and will carry a light grocery bag. Her children also take care of the yard.

Ms. Bessara takes care of her plants and two little dogs. She used to garden, but now the plants are in pots on the wall so she doesn't have to bend. She rakes the "doggie pooh" every other day. After that 10 to 15 minute chore, she makes tea and lays down to rest. She spends most of the day reclining, watching TV, and reading because her back hurts, and never stops hurting.

Her medication does not affect her memory, thought process, or concentration. About every two months, Ms. Bessara receives a shot for pain. Ms. Bessara can lift about three pounds and sit for ten minutes without pain. She can stand a little longer, about 15 to 20 minutes. She does walk to the store but needs someone with her. About six months earlier, she fell on some stairs when her leg gave way.

Because the doctors can not tell that she will definitely be better, Ms. Bessara does not want back surgery. However, the back pain has been getting worse. If that continues, she may reconsider surgery because she's "got to do something."

Before the injury, she used to walk. Now, she can't sit through a movie. The worse part about her condition is that she can't do what she wants.

[Cross-examination] Ms. Bessara doesn't think work is a reasonable option for her now. She is receiving Social Security payments. She has work experience in: child care, food production, and office filing.

Ms. Bessara enjoys working with children and being with her grandchildren. After 1991, her ability to deal with her grandchildren was limited. After 1997, she could no longer pick them up. At times, but not too often, she accomplishes the exercises recommended by Dr. McCaffrey.

Deposition of Ms. Mary Bessara
(EX 19)

In an April 2003 deposition, Ms. Bessara, a recent widow, indicated that she takes the medicine for pain and anxiety prescribed by Dr. McCaffrey in the morning and evening. She has five grown children who all live in Hawaii. Because the school system has a shorter duration in England, her formal schooling there ended when she was 15. After school graduation, she worked a few years in a food preparation plant and was also a company clerk.

In May 1981, after her children had grown, Ms. Bessara started working as a day care attendant in a naval facility. Eventually, she became a cook for a day care center, preparing between 50 and 120 meals a day. She suffered her first back injury at work when she attempted to place some melons on the top of a refrigerator. After six months of medication, rest, and physical therapy, she was able to return to work. Prior to the January 1997 injury, Ms. Bessara did not have any back pain or leg symptoms.

Decades ago, Ms. Bessara injured her upper neck in a car accident. Since corrective surgery, she has experienced no problems with her upper spine.

On January 21, 1997, as she bent down and pulled a big pan of food out of an oven, Ms. Bessara experienced a horrible pain in her low back that ran down her legs. She stopped work and went to the emergency room. Later, she saw Dr. McCaffrey for treatment. Ms. Bessara obtained no pain relief from the procedure conducted by Dr. Smith. Since the physicians can not say for sure that she will obtain some pain relief, Ms. Bessara has declined back surgery.

Her pain varies some from 7 to 10 out of 10. On her bad days, Ms. Bessara does absolutely nothing. At other times, she does "little bits in between and [goes] back and lay[s] down." Ms. Bessara finds the home exercises are too painful to accomplish and generally spends her time watching TV or reading. At times, her legs give way; she's nearly fallen down some stairs. Ms. Bessara can walk for about 15 minutes before her legs give out. At present, she has chronic pain in her back and legs, with a tingling sensation in her left big toe. The pain limits her activities. She does water her plants outside and takes care of two small dogs. Ms. Bessara is able to do her laundry but only shops occasionally. Usually, her children help her with shopping. She doesn't drive her deceased husband's car. She can't ride the Bus because she is unable to walk to the bus stop.

Ms. Bessara does not believe she is capable of returning to work in child care. Additionally, due to her limited education, she does not believe tutoring is an option.

Medical Records

(CX 1 to CX 4, CX 6, and CX 10)

For several days in December 1998 and January 1999, Ms. Bessara received therapy treatment at Hadley Rehabilitation for lumbar disc syndrome with radiculopathy. At that time, Ms. Bessara, who had injured her back on January 21, 1997 lifting a pan, complained about low back pain of 7/10 when resting and 8/10 during activity. The pain radiated into her legs. Upon examination, the therapist observed diminished physical strength and tense back muscles. The diagnosis was chronic lumbar pain, tense shoulder muscles, chronic deconditioning, and poor lumbar stability. The therapy led to some reduction of pain and home exercises were recommended.

Between July 1999 and February 2000, Dr. McCaffrey saw Ms. Bessara for her back pain about every two to three weeks. Throughout this period, the physician placed her in off-duty status. Dr. McCaffrey's diagnosis was lumbar disc syndrome with radiculopathy and possible central cord involvement. Usually, Ms. Bessara rated her pain at 7 to 8 out of 10. On occasion, her back pain would flare up. Upon examination, Dr. McCaffrey typically found mid-line muscle tenderness. In addition to a range of prescription medicine, Dr. McCaffrey would periodically give Ms. Bessara a pain shot. In August 1999, Ms. Bessara received a morphine shot for back pain at an emergency room. In September 1999, Ms. Bessara underwent a functional capacity examination (FCE). She was physically unable to accomplish many of the requested tasks due to pain and believed the person administering the examination pushed her too hard. In particular, she found lifting an item weighing 30 pounds exceptionally painful. Following the evaluation, Ms. Bessara's back pain increased. Dr. McCaffrey reviewed the FCE results and commented that the sitting restriction of 15 to 20 minutes was consistent with her complaints. He concluded Ms. Bessara was not able to perform any specific job. Eventually, Dr. McCaffrey suggested a surgical procedure to stabilize the lumbar area; Ms. Bessara was not willing to undergo that procedure.

In November 2001, Ms. Bessara received some additional physical therapy.

Between January 2002 and May 2002, Dr. McCaffrey continued his periodic treatment of Ms. Bessara's back. She reported her pain as 7/10. Upon examination, he observed tenderness in the low back area, muscle spasm, and a mild reduction in strength. The leg lifts were positive, with the effect greater for the left leg. The pain impaired her daily living activities and she had a significant impairment.

Functional Capacity Evaluation
(CX 7 and CX 8)

In August and September 1999, over the course of several days, Ms. Bessara's functional capacity was evaluated. The examiner noted that while Ms. Bessara cooperated with the test, she was inconsistent and displayed moderate pain behavior. Although she could stand and sit up to 20 minutes at a time, Ms. Bessara had decreased bilateral lower extremity range of motion, coupled with decreased trunk stability. She could lift between 5 to 10 pounds; however, she was unable to lift from the floor due to an inability to fully squat. The noted limitations included no forward bending, step

ladder climbing or balancing. Ms. Bessara was also limited to the following percentages of an 8 hour work day: walking, no more than 33%; stair climbing, no more than 5%; sitting, no more than 66% (with movement permitted every 15 to 20 minutes); and standing, no more than 33% (with movement permitted every 15 to 20 minutes).

Functional Capacity Evaluation
(CX 9 and EX 8)

In April 2002, Ms. Bessara attempted a second FCE. Upon examination, the examiner noted decreased ankle jerk, diminished leg strength and decreased spinal range of motion. Only one of seven Waddell tests were positive. Due to increased pain, Ms. Bessara was unable to continue with the functional testing.

Form LS - 208
(CX 13 and EX 10)

On July 19, 2002, based on an LMS (labor market survey), the Employer reduced the amount of Ms. Bessara's weekly compensation of \$249.84, which was based on an average weekly wage of \$374.75.

For the Employer

Sworn Testimony of Dr. Gabriel W.C. Ma
(TR, pages 115 to 145)

[Direct Examination] Dr. Ma is a board certified orthopaedic surgeon, a spinal surgery specialist, and a professor of surgery at the University of Hawaii.⁵ He evaluated Ms. Bessara on three occasions between April 1998, after she injured her back at work by twisting and lifting, and October 2002. The medical studies conducted by the time of his first examination showed Ms. Bessara had a degenerative L4-5 disk with left side radiculopathy. Ms. Bessara had declined back surgery.

When Dr. Ma examined Ms. Bessara in October 2002, she presented with complaints of low back pain and pain radiating down her left lower extremity and foot. Her symptoms were consistent with L 5 radiculopathy. Dr. Ma diagnosed herniated L4-5 disk.

After reviewing Dr. McCaffrey's records, Dr. Ma believes the treatment has not been appropriate because Ms. Bessara has not been referred to either a psychiatrist or pain management physician.

Based on his examinations, Dr. Ma. does not consider Ms. Bessara totally disabled from all types of work. Her physical condition is stable. Ms. Bessara is capable of sedentary work with the

⁵I accepted Dr. Ma as an expert in orthopaedic surgery (TR, page 119).

following restrictions: lifting more than 20 pounds occasionally; sitting or standing more than 30 minutes; climbing more than 5 feet; and excessive bending, kneeling or crawling. Considering her slow movements, Dr. Ma would not permit her to operate machinery.

Due to Ms. Bessara's limited endurance, she should return to work part-time and slowly work up to full-time over a two month period as follows: 2 hours a day/5 days a week for 3 weeks; 4 hours a day/5 days a week for 2 weeks; and, 8 hours a day/5 days a week.

Dr. Ma reviewed the job descriptions provided by Ms. Figueroa. He found some of the work acceptable; he rejected other jobs.

Ms. Bessara has a painful spinal condition which makes her a candidate for surgery.

[Cross-examination] Ms. Bessara's return to work should be phased-in. None of the jobs he reviewed indicated that Ms. Bessara could phase into that work. If a job would not permit a phase-in, then it is not suitable for Ms. Bessara.

If Ms. Bessara reported that she had trouble lifting 20 pounds, Dr. Ma would agree the lifting limitation should be reduced. The lifting limitation includes repetitive lifting of no more than 5 pounds. At each stage of the process of moving Ms. Bessara from part-time to full-time work, Dr. Ma would recommend an evaluation to see how she is progressing. If the job requires severe bending beyond the hip, it would not be suitable for Ms. Bessara. Due to her depression and backache, Ms. Bessara probably shouldn't work with child, which requires a lot of running around and activities she is not capable of doing. She should not attend small children.

Absent a full functional capacity evaluation, Dr. Ma can not be certain of the weight lifting maximum. She can push 50 pounds. Most of his restrictions are estimates. Due to Ms. Bessara's pain complaints, he could not conduct a range of motion evaluation.

Most of the time, a treating physician's opinion should be given greater value because he is in a better position to know a patient's complaints and problems.

[Re-direct Examination] Dr. Ma disagrees with Dr. McCaffrey's opinion that Ms. Bessara can not do any work. Ms. Bessara is not totally disabled. Within his restrictions, she is capable of part-time work. If a two hour part-time job were not available, then she could start at four hours a day.

[ALJ Examination] Although a two hour part-time job is preferable, medically, Ms. Bessara has the capability to start working at 4 hours a day. He initially stated two hours because "Well, I didn't know that restrictions at that time because we . . . no explanation on the restrictions."

[Re-cross Examination] If Dr. Ma had a patient with Ms. Bessara's problems, he would recommend starting her at two hours a day.

[Re-direct Examination] Physically, Ms. Bessara can start working four hours a day, but Dr. Ma “would stick to two hours.”

October 21, 2002 Letter by Dr. Ma
EX 12

On October 21, 2002, after reviewing his report, comments about the videotape review, and Ms. Bessara’s medical reports from Dr. McCaffrey, Dr. Ma concluded Ms. Bessara did not have the clinical symptoms associated with the herniated, left side, disc that had been identified in the 1998 MRI. In Dr. Ma’s opinion, Ms. Bessara was physically capable of permanent, light duty employment, including the jobs he approved in the labor market survey. However, due to her depression and chronic pain syndrome, he also believed her re-employment would be unsuccessful. As a result, Dr. Ma recommended that she be retired as soon as possible.

October 28, 2002 Letter by Dr. Ma
EX 13

On October 28, 2002, in response to additional inquiries, Dr. Ma examined Ms. Bessara, who continued to complain about low back pain. He observed her walk with a left sided limp and found limited range of motion in the low back, without severe pain. His observation also disclosed some relative muscle atrophy in the left calf. Although Dr. Ma believed she remained physically capable of light duty, he noted Ms. Bessara’s desire to retire and recommended that she be allowed to do so.

Deposition of Dr. Ma
(EX 17⁶)

In an April 2003 deposition, Dr. Ma reviewed his October 2002 examination of Ms. Bessara. At that time, her symptoms and condition had not significantly changed since his prior examinations in April 1998 and October 2001. She does limp, which is consistent with a left sided herniated disc. However, the disc is not pinching on the nerve enough to warrant surgery. She was taking an anti-inflammatory drug, which definitely helps her. She also had been prescribed anti-depression and muscle relaxer medication. Ms. Bessara should limit her bending and twisting of her back. Squatting is not a problem. She can lift about 20 pounds, pull 50 pounds, and push 100 pounds. Dr. Ma does not recommend Ms. Bessara work with children because she is depressed and “she cannot chase after the kids with her back trouble.”

Sworn Testimony of Ms. Eileen Figueroa
(TR, pages 149 to 194)

⁶See also EX 14.

Ms. Figueroa is a vocational rehabilitation specialist.⁷ For Ms. Bessara's case, Ms. Figueroa prepared a transferable skills assessment and a labor market survey. She attempted to contact Ms. Bessara through her lawyer but received no response.

In the transferable skills assessment (EX 4), Ms. Figueroa identified Ms. Bessara as a high school graduate with average aptitude and intelligence. She also considered the physical restrictions imposed by Dr. McCaffrey, who essentially accepted Dr. Ma's limitations with two exceptions. Dr. McCaffrey limited Ms. Bessara's lifting to five pounds and her push/pull to 20 pounds. Essentially, Ms. Bessara was capable of sedentary work.

Next, utilizing a job developer, Ms. Figueroa obtained information from employers about suitable work. Initially, she was able to present Ms. Bessara's physical limitations for consideration. A change in federal privacy laws subsequently limited her inquiry to the physical requirements set out by the employers. In January 2002, Ms. Figueroa found job opportunities in the following four areas: teacher aide, child care aide, receptionist, and veterinary technician.

Ms. Figueroa presented the job listing to both Dr. Ma and Dr. McCaffrey. Eventually, after further clarification of Ms. Bessara's job skills, Dr. Ma approved the jobs. Dr. McCaffrey did not.

Ms. Figueroa is familiar with the graduated return to work approach, or work tolerance concept. The use of a graduated approach would be a problem for the full time jobs. In Ms. Figueroa's opinion, most of the employers offering part-time work would accommodate a graduated approach.

Based on additional contacts, Ms. Figueroa determined that through April and May 2003, job opportunities in the areas of teacher aide and receptionist continued to exist in the local community.

[ALJ Examination] Ms. Figueroa showed Dr. McCaffrey the transferable skills assessment and labor market survey. Dr. McCaffrey indicated that Ms. Bessara could probably do some of the work, but he was not willing to commit to her ability to return to work without a functional capacity evaluation.

[Cross Examination] In April 2002, Dr. McCaffrey didn't agree that Ms. Bessara could do the listed jobs. Instead, he said she probably could do them but he would rather have her undergo a functional capacity evaluation first.

Some of the job listings indicate some college is preferred. However, the lack of college does not disqualify a person from that job.

When Dr. Ma first reviewed the job list, he rejected some of the openings. After Ms. Figueroa talked to him about Ms. Bessara's skills, he no longer had any objections. Ms. Figueroa was not

⁷I accepted Ms. Figueroa as a vocational expert (TR, page 150). *See also* EX 21.

aware that Dr. Ma recommended Ms. Bessara not work with small children. That limitation would make a difference in regards to the pre-school teacher aide and child care aide jobs.

Ms. Figueroa did not specifically confirm with any employer whether a person could phase into full time work. Based on her experience, she believes some of the employers might permit such an approach. The pay listed on the job description is the current rate of pay.

She believes Dr. McCaffrey returned Ms. Bessara to work up to 40 hours a week because he accepted Dr. Ma's work restrictions and Dr. Ma had indicated she could work up to 40 hours.

Ms. Figueroa is unaware how Ms. Bessara might get to work. Unless transportation is part of the job requirement, she does not factor that consideration into the labor market survey. Based on a job application by Ms. Bessara, Ms. Figueroa believes she is a high school graduate.

When she accomplished an update to the labor market survey, Ms. Figueroa sent the list to Ms. Bessara and asked her to apply for the jobs.

Employment Qualification Documents
(EX 2)

In Naval employment qualification documents, Ms. Bessara reported work experience as a child care attendant, which included light food preparation, and a volunteer teacher aide. Ms. Bessara indicated she was either a high school graduate, or obtained a GED, as of June 1956 in England.

Transferable Skills Assessment and Labor Market Survey
(EX 4, EX 5, EX 6, and EX 18)

In January 2002, Ms. Figueroa reviewed Ms. Bessara's medical record, work history, and physical limitations. She noted that an MRI and physicians' evaluations from 1998 established that Ms. Bessara had a herniated disc at L4-5 with lateral nerve encroachment on the left side. According to Dr. Ma in August 2001, Ms. Bessara had reached maximum medical improvement ("MMI"). At the same time, he opined that she could not return to her former work as a cook. Dr. McCaffrey agreed Ms. Bessara had reached MMI considering her declination to undergo spinal surgery.

According to Ms. Figueroa, Ms. Bessara had work experience as a child care attendant, voluntary teacher aide, food service worker, and cook. With a high school education, Ms. Bessara had average reasoning and language skills. Ms. Bessara had the requisite experience to work as a teacher assistant, child care provider, customer service representative, and, with training, a clerical worker.

Based on Dr. Ma's opinion, as modified by Dr. McCaffrey, Ms. Bessara was capable of sedentary work with physical limitations that included no excessive bending or twisting of the low

back. Likewise, a suitable job should not require excessive standing or squatting. She could lift up to 5 pounds and was able to carry no more than 20 pounds.

Based on the above criteria, Ms. Figueroa then surveyed local employers and identified several available full-time and part-time employment opportunities. The specific employment openings were:

a) Church pre-school. A new pre-school had both part-time, and substitute, jobs available, with variable hours up to 20 a week, and an entry pay of \$6.00 an hour. Although the positions were open, they were “rarely” available. The employer expressed a willingness to work with Ms. Bessara’s limitations. In early February 2002, Dr. Ma did not approve the job considering Ms. Bessara’s age and education. After Dr. Ma reviewed Ms. Bessara’s work history, provided by Ms. Figueroa, he stated the job was “good.”

b) Church pre-school. Another church pre-school had an anticipated opening for a part-time aide, with varying hours, at \$6.50 an hour. The position was “rarely” open. Dr. Ma did not believe Ms. Bessara was physically capable of this work. Upon reconsideration of Ms. Figueroa’s comments, Dr. Ma found the job was “good” and indicated Ms. Bessara could “work with children.”

c) Private pre-school. The pre-school had a part-time job, about 32 hours a week, as a teacher assistant for \$7.00 an hour. The availability of such a position varied. The employer agreed Ms. Bessara could lift, stand, sit, and walk within her limitations. Dr. Ma found Ms. Bessara physically qualified but questioned her suitability due to education and depression. After a second review, Dr. Ma stated this was a “good” job.

d) Pet Clinic. A pet clinic was looking for a part-time, 20 hours a week, receptionist. No salary was disclosed and the employer indicated the position was “rarely” open. Dr. Ma found the job suitable for Ms. Bessara. Following a review of her work history, Dr. Ma again stated this was a good job for Ms. Bessara.

e) AAA Hawaii. This company was seeking a part-time, 19 to 25 hours a week, customer service clerk, with an hourly wage of \$7.53. Dr. Ma indicated that Ms. Bessara was physically qualified and the number of hours were suitable, provided she was interested in training. In his second evaluation, Dr. Ma again stated Ms. Bessara was physically qualified.

f) Travel Hawaii. This firm was offering a full time, 40 hours a week, position for a sales assistant at \$9.00 an hour. Although the company was currently taking continuous applications, the job was “rarely” open. Dr. Ma found Ms. Bessara physically qualified for this work. In his second evaluation, Dr. Ma again stated Ms. Bessara was physically qualified.

g) HMSA. A full-time, 40 hours a week, tele-service representative position was open. The job paid \$10.56 an hour. The job required one year of college or six months to one year of customer

service experience. Because of the long hours, Ms. Bessara's lack of computer skills, and age, Dr. Ma did not "feel" this would be a suitable job for her. Upon reconsideration, Dr. Ma approved this job provided Ms. Bessara was willing to train in computers.

Letters by Ms. Figueroa
(EX 20 and EX 22)

In two letters, dated May 8 and May 9, 2003, addressed to Ms. Bessara, Ms. Figueroa listed several contact persons and phone numbers for several full time and part time employment opportunities as a pre-school aide, teacher aide, enrollment representative, customer service representative, and receptionist. Neither the respective salaries nor the associated physical requirements of the jobs were indicated in the letters.

Surveillance Report
(EX 9 and EX 23)

On June 22, 2002, surveillance was conducted on Ms. Bessara's residence from about 6:00 a.m. to 3:30 p.m. During this nine and a half hour period, Ms. Bessara was observed for one and a half minutes watering plants outside with a hose.

On June 24, 2002, from 6:00 a.m. to 3:30 p.m., Ms. Bessara was not observed outside her residence.

On June 25, 2002, from 6:00 a.m. to 3:30 p.m., a window reflection of Ms. Bessara around 10:30 a.m. indicated she might be cleaning her back yard. The investigator was unable to get a closer view. No other observations of Ms. Bessara were accomplished.

On June 26, 2002, about one hour after starting surveillance, the investigator observed Ms. Bessara pull a rake from on top of a carport and begin raking along side the carport. After looking at the surveillance vehicle, Ms. Bessara leaned against a staircase and raked a little longer. She then sat down. Next, she leaned forward and appeared to rake some leaves into a white plastic bag. After a total of 8 1/2 minutes, Ms. Bessara went behind the house out of sight and surveillance was terminated.

On June 27, 2002, about two hours after initiating surveillance at around 6:20 a.m., Ms. Bessara was observed leaving her home with another person and was driven to a medical center. About half an hour later, Ms. Bessara departed with the individual and went to a grocery store. After 20 minutes, Ms. Bessara pushed a cart to a car and unloaded three grocery bags through the car window onto the seat of the car. After her arrival back at her residence around 10:00 a.m., no other activity was noted through 3:44 p.m. when the surveillance terminated.

On July 17, 2002, about two hours after initiating surveillance around 6:00 a.m., the investigator followed a car carrying Ms. Bessara as a passenger. Eventually, around 10:30 a.m., she

was observed being driven to a medical center by an individual and eventually going to a store. About 30 minutes later, Ms. Bessara returned to the vehicle and placed unidentified items into the trunk of the car. After she returned home, the surveillance of her residence continued until 4:00 p.m. without any further observations.

In the summary, based on Ms. Bessara's raking and shopping activities, the investigator noted her movements seemed unrestricted. In his opinion, she did not appear to be handicapped.

Payment of Compensation Form
(EX 11)

As of July 21, 2002, the Employer started paying Ms. Bessara \$79.22 a week for ppd (permanent partial disability).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Stipulations of Fact

The parties have stipulated to the following facts (TR, pages 7 to 9):

- a) On January 21, 1997, Ms. Bessara suffered an injury during, and in the course of, her employment.
- b) At the time of the injury, an employer-employee relationship existed between the parties.
- c) The average weekly wage is \$374.75, with a corresponding weekly compensation rate of \$249.84.
- d) The nature of Ms. Bessara's disability is permanent.

Issue - Extent of Disability

Under the Act, a claimant's inability to work due to a work-related injury is addressed in terms of the extent of the disability (total or partial) and the nature of the disability (permanent or temporary). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). As just noted above, the parties have stipulated that the nature of Ms. Bessara's impairment is permanent.

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). The Act defines disability

as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his or her pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and his or her inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity. Additionally, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5th Cir. 1986).

In light of these principles, determination of extent of disability involves a multi-step process. *SEACO and Signal Mutual Indemnity Assoc., Limited v. Bess*, 120 F.3d 262 (4th Cir. 1997) (unpublished); *see also Newport News Shipbuilding & Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). As a first step, to establish a *prima facie* case of total disability, whether temporary or permanent in nature, a claimant has the initial burden of proof to show that he or she cannot return to his or her regular or usual employment due to work-related injuries. This evaluation of loss of wage earning capacity focuses both on the work that an injured employee is still able to perform and the availability of that type of work which he or she can do. *McBride*, 844 F.2d at 798. At this initial stage, the claimant need not establish that he or she cannot return to any employment, only that he or she cannot return to his or her former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). A claimant's credible testimony of considerable pain while performing work may be a sufficient basis for a disability compensation even though other evidence indicates the claimant has the capacity to do certain types of work. *Mijangos v. Avondale Shipping, Inc.*, 948 F.2d 194 (8th Cir. 1999); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

Prima Facie Case

Prior to her January 21, 1997 injury, Ms. Bessara was a full time cook at a naval day care facility. That job required Ms. Bessara to bend over and lift heavy pans out of ovens. According to Dr. McCaffrey, due to her injury, Ms. Bessara is no longer able to accomplish any productive work. As reported by Ms. Figueroa, and reflected in his sedentary work restriction, Dr. Ma also believes Ms. Bessara is unable to return to her former work as a day care center cook. Thus, based on the consensus of the medical opinion, Ms. Bessara has established that she is no longer capable of returning to her pre-injury employment. Accordingly, Ms. Bessara has presented a *prima facie* case of total disability.

Suitable Alternative Employment

If a claimant is able to demonstrate he or she is unable to return to his or her former job, then in the second step of the disability adjudication process, the employer has the burden of production to show that suitable alternate employment is available. *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). The availability of suitable alternative employment involves defining the type of jobs the injured worker is reasonably capable of performing, considering his or her age, education, work experience and physical restrictions, and determining whether such jobs are reasonably available in the local community. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1978) and *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). Additionally, the Employer must demonstrate such jobs are readily available. *Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993) *cert. denied*, 511 U.S. 1031 (1994). The terms of the suitable alternative employment must include the pay scale in order to establish the claimant's earning capacity. *Moore v. Newport News Shipbuilding & Dry Dock, Co.* 7 BRBS 1024 (1978). The showing of available suitable alternative employment may not be applied retroactively to the date of maximum medical improvement. An injured worker's total disability becomes partial on the earliest date that the employer shows suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

Pain Complaints

In determining suitable alternative employment, I must first establish Ms. Bessara's present ability to work. As previously indicated, since credible complaints of pain may establish a compensable disability, I turn to the issue of Ms. Bessara's pain complaints. For the reasons set out below, having considered some conflicting evidence about her physical impairment and pain, I find Ms. Bessara's pain complaints to be credible.

At the hearing, both in demeanor and response, Ms. Bessara was a credible witness who presented straightforward testimony without hesitation and equivocation. Her testimony, coupled with other evidence in the record, including Dr. McCaffrey's treatment notes demonstrate that prior to her 1997 back injury, despite a back problem years earlier, Ms. Bessara was pain-free and able to perform her somewhat strenuous work as a day care center cook without any difficulty. The severe pain she experienced on January 21, 1997 was singular in severity and forced her from work that day. Despite medication, some therapy, initial repeated attempts at returning to work, and eventually, a spinal heat injection procedure, Ms. Bessara's credible testimony establishes that her low back pain and leg symptoms persist to the extent they significantly limit her daily activities.

I have considered the reported observations from the surveillance conducted in the summer of 2002. Ms. Bessara was seen watering her plants, reaching for a rake, raking for several minutes, picking up leaves, pushing a grocery cart, moving grocery bags from a cart to a car seat, and placing some items in a car trunk. Due to these activities, the investigator reached one possible conclusion - Ms. Bessara did not have any handicap.

Yet, since other, just as likely, conclusions may be drawn from the same observations, I find the surveillance report is insufficient to impeach or contradict Ms. Bessara's presentation of her

symptoms and limitations due to pain. Since the weight of the leaves, grocery bags, and items are indeterminable, the lifting of those items could just as well be within her limited physical capability. Consistent with her testimony concerning limited endurance, the surveillance also noted that Ms. Bessara was only able to rake leaves a few minutes without sitting down and she stopped completely after about eight minutes.⁸ The surveillance report can even additionally be interpreted to support Ms. Bessara's claim that her painful condition severely limits her activities. During six days, the investigator monitored Ms. Bessara's residence for about 49 hours. The fruit of his observations was just over 30 minutes of physical activity. For the remaining 48 and a half hours, the investigator observed no physical activity by Ms. Bessara, consistent with her testimony that she typically does very little. Finally, and significantly, neither Dr. McCaffrey, who was aware of the reported activities, nor Dr. Ma, who reviewed the surveillance report, found that surveillance sufficiently probative to alter their assessments of Ms. Bessara's drastically limited physical capabilities.

In further strong support of Ms. Bessara's credibility, neither Dr. McCaffrey nor Dr. Ma, who were most familiar with her condition and symptoms, questioned the veracity or legitimacy of her pain complaints. Clearly, Dr. McCaffrey has no doubt that Ms. Bessara struggles with a painful spinal condition. While, as to be discussed later, Dr. Ma seems to disagree on the severity of the pain, he does not indicate that her clinical presentations were contrived or manipulative. Similarly, neither examiner conducting the preliminary examinations for the 1999 and 2002 FCEs suggested Ms. Bessara's physical and endurance limitations due to pain were not real.

Consequently, based on her believable testimony, deposition, medical opinion, and the preponderance of the objective medical evidence, I find Ms. Bessara's pain complaints are valid and that her activities are limited by both the physical deficit associated with her herniated disc and her chronic severe low back and leg pain.

Medical Opinion

Having determined the validity of Ms. Bessara's pain complaints, I next turn to the medical assessments of Ms. Bessara's capacity to return to work. According to Dr. McCaffrey, although physically capable of some limited activities, Ms. Bessara is unable to return to any type of employment due to the chronic and systemic nature of her back condition. Dr. Ma disagrees. In Dr. Ma's opinion, Ms. Bessara is capable of a phased-in return to sedentary work, with associated restrictions on the extent of her physical effort.

To resolve this dispute in medical opinion, I must assess the relative probative weight of these two divergent medical opinions. The several factors I consider in evaluating relative probative weight are: a) documentation; b) medical qualifications; and, c) reasoning;.

⁸The investigator suspected Ms. Bessara changed the manner in which she was raking because she had spotted his vehicle. Once again, just as likely, Ms. Bessara's observed actions are consistent with her claim to be unable to continue any activity beyond a very short period of time without resting.

As to the first factor, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two and one encounter.

The second factor to come into play is the respective board certifications of the physicians expressing medical opinions in the record. The qualifications of physicians are relevant in assessing the respective probative values of their medical opinions. See *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). At the same time, and related to the consideration of documentation, the opinion of a treating physician may be entitled to greater probative weight than the opinion of a non-treating physician based on a long term physician-patient contact. See *Downs v. Director, OWCP*, 152 F.3d 924 (9th Cir. 1998) and *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir.1999), *cert. denied sub. nom. Sea Land Serv., Inc. v. Director, OWCP*, 528 US 809 (1999).

The third factor involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

With these principles in mind, I first note that both Dr. McCaffrey and Dr. Ma have extensive documentation to support their respective opinions. Understandably, as Ms. Bessara's treating physician since the 1997 injury, Dr. McCaffrey has developed a firm foundation of objective and clinical evidence to support his conclusion that Ms. Bessara is unable to return to work. In a somewhat different manner, Dr. Ma's documentation for his conclusion that Ms. Bessara could return to work was obtained through three examinations of Ms. Bessara over the course of five years and a review of Dr. McCaffrey's treatment notes. By reviewing Dr. McCaffrey's treatment notes, Dr. Ma also indirectly derived some of the documentation advantages associated with a treating physician, which in turn diminishes the potential evidentiary enhancement usually attributed to a treating physician.

Next, concerning probative value based on status, as just noted above, Dr. McCaffrey's status as Ms. Bessara's treating physician adds little to the probative weight equation since Dr. Ma had the benefit of reviewing Dr. McCaffrey's observations. In contrast, at first pass, Dr. Ma's status as a board certified orthopaedic surgeon might add evidentiary value to his opinion. However, the issue both doctors address deals with Ms. Bessara's occupational health and re-employment capability rather than the orthopaedic cause of Ms. Bessara's back problem. Both Dr. Ma and Dr. McCaffrey agreed that the objective medical evidence establishes that Ms. Bessara has a herniated disc at L4-5

with L5 radiculopathy. Based on that consensus, Dr. Ma was not called upon to apply his board certified expertise as an orthopaedic surgeon to resolve an orthopaedic dispute. Instead, the issue before me involves occupational rehabilitation in which Dr. McCaffrey may have the advantage based on his years of experience in that area. For these reasons, I ultimately conclude that consideration of the respective status of the two physicians does not help determine relative probative weight in this case.

In considering the third differentiating factor, I conclude that Dr. McCaffrey's assessment of Ms. Bessara's ability to return to work is the better reasoned medical opinion in this case because he more fully integrates all aspects of Ms. Bessara's present condition. Specifically, based on both objective medical tests and clinical observations, including Ms. Bessara's credible complaints of pain, Dr. McCaffrey presented a diagnosis consisting of three components. First, as Dr. Ma also diagnosed, Ms. Bessara has a herniated disc and a left side pinched nerve. Second, over the course of years, Ms. Bessara has developed reactive depression. Third, and significant in my evaluation, Ms. Bessara has chronic pain syndrome.

As he partially acknowledged to Ms. Figueroa and testified at the hearing, Dr. McCaffrey believes Ms. Bessara is capable of some physical activity, including lifting light weights, standing, walking, and sitting for 15 to 20 minutes at a time. However, on determining whether Ms. Bessara has a realistic ability to return to work, Dr. McCaffrey doesn't stop with consideration of Ms. Bessara's physical strength to accomplish tasks. Importantly, Dr. McCaffrey also evaluates the additional impact attributable to her chronic pain and reactive depression. He concludes that Ms. Bessara suffers a significant impairment due to chronic pain. That is, while Ms. Bessara can lift some weight, walk, stand, and sit, her ability to endure those activities is severely limited to an hour or two. Dr. McCaffrey's opinion on her endurance is certainly partially supported by the 1999 FCE⁹ which showed Ms. Bessara capable of enduring no more than 20 minutes of sitting or standing without some movement. The study also found Ms. Bessara incapable of standing or walking for more than a third of an 8 hour work day, about 2 and 1/2 hours. Her sitting capacity each work day was no more than 5 hours.

In contrast, Dr. Ma's documented opinion is not as well reasoned and has less relative probative value because he narrowly focused on Ms. Bessara's physical capability and also presented multiple inconsistent statements and conclusions. In determining whether Ms. Bessara could return to work, Dr. Ma stressed her demonstrated ability to accomplish some physical tasks. Based on that capacity, Dr. Ma stated Ms. Bessara was able to perform light duty or sedentary work. Unlike Dr. McCaffrey's evaluation, Dr. Ma's opinion on Ms. Bessara's employment capacity, for the most part,¹⁰ did not include consideration of her diagnosed chronic pain syndrome and reactive depression. Dr.

⁹Since the medical record shows no improvement in Ms. Bessara's back condition, the 1999 FCE still remains relevant four years later.

¹⁰As discussed later, Dr. Ma did disqualify some work for Ms. Bessara due to her depression and pain.

(continued...)

Ma's October 21, 2002 letter provides a clear example of his selective focus. In the letter, he first opined that Ms. Bessara was physically capable of light duty employment and approved several jobs in the labor market survey for her. Then, in the same letter, due to Ms. Bessara's depression and chronic pain syndrome, Dr. Ma additionally stated his belief that her re-employment would be unsuccessful.

Numerous inconsistencies in his presentations also adversely affect the probative value of his opinion. In the October 21, 2002 letter, Dr. Ma stated that based on his review of the record, including Dr. McCaffrey's treatment notes, he believed Ms. Bessara did not have the symptoms associated with a herniated disc that was identified by a 1998 MRI. Yet, in both his April 2003 deposition and May 2003 hearing testimony, Dr. Ma diagnosed Ms. Bessara with a L4-5 herniated disc with L5 radiculopathy. In his deposition, he also stated her limp was consistent with a left side herniated disc.

Concerning the severity of Ms. Bessara's pain, Dr. Ma stated in his deposition that her spinal condition was not sufficient to warrant surgery and he would not recommend it. A month later at the hearing, Dr. Ma testified Ms. Bessara had a painful spinal condition that made her a candidate for surgery.

When he initially reviewed the multiple job opportunities, which included pre-school teacher aide and day care attendant positions, Dr. Ma found them suitable for Ms. Bessara. Commenting on a church pre-school aide job, Dr. Ma stated Ms. Bessara "could work with children." In contrast, in his subsequent deposition, Dr. Ma did not recommend Ms. Bessara working with children due to her depression¹¹ and her inability to "chase after the kids with her back trouble." At the hearing, Dr. Ma reiterated that due to her depression and back ache, Ms. Bessara should not work with children.¹²

During his initial review of the church pre-school aide job, Dr. Ma told Ms Figueroa that Ms. Bessara was not physically capable of the work associated with that work. Then, after Ms. Figueroa discussed Ms. Bessara's work qualifications with Dr. Ma, he stated the church pre-school aide job was "good."

Upon his review of the labor market survey, Dr. Ma eventually approved a couple of jobs openings that involved full-time employment. However, at the hearing, Dr. Ma indicated Ms. Bessara

¹⁰(...continued)

However, his fundamental finding that Ms. Bessara was capable of light duty work appears based solely on her physical ability to do some lifting, standing, walking, and sitting.

¹¹Dr. Ma did not indicate why he limited consideration of the adverse effect of Ms. Bessara's depression only to work associated with children.

¹²Ms. Figueroa, who had received Dr. Ma's approval for the child care jobs, indicated in her hearing testimony that she was not aware that Dr. Ma had apparently changed his opinion on the suitability of such work.

was not ready for full time employment. Instead, he recommended a gradual re-entry into work with medical assessments prior to increasing the length of the work day.

Finally, at the hearing, in explaining his requirement for a phased-in approach for Ms. Bessara's re-employment, Dr. Ma set out rather clearly a schedule that started her working two hours a day for five days a week for three weeks. If Ms. Bessara were able to tolerate that work load, then Dr. Ma would increase her work day to four hours a day for a couple of weeks, and so on until she achieved the ability to work full time. Yet, upon further questioning, Dr. Ma stated that in physical terms, Ms. Bessara could handle four hours a day as soon as she started working. Then, in an apparent attempt to clarify, Dr. Ma explained that his use of two hours a day was a preferable recommendation but not the actual physical limit for Ms. Bessara.¹³ However, he then closed his discussion on the matter with a statement that if Ms. Bessara were his patient, he would recommend two hours a day as a starting point.

Although individually the above noted inconsistencies may not be significant, their cumulative effect diminishes my confidence in the certainty of his medical opinion. This pattern of variability in his responses reduces the probative value of his medical opinion on Ms. Bessara's ability to return to work.

In summary, while both Dr. Ma and Dr. McCaffrey based their extent of disability assessments on extensive documentation, I find Dr. McCaffrey's opinion to be the better reasoned, and more probative, medical opinion. Correspondingly, since the more probative medical opinion establishes that Ms. Bessara remains unable to work due to the physical, chronic pain, and depression impairments associated with her work-related injury, I find the extent of Ms. Bessara's disability is total.¹⁴

Labor Market Survey

My determination that Ms. Bessara is unable to return to any employment and, thus, the extent of her disability is total precludes the necessity of evaluating the labor market survey. However, I believe some discussion about the identified job opportunities is warranted because even if I had determined that Ms. Bessara was capable of some sedentary work, the labor market survey in this case still does not establish suitable alternative employment.

In light of their most recent opinions, as presented at the hearing, both Dr. McCaffrey and Dr. Ma would not approve any job that involves young children. As a result, the pre-school teacher aide

¹³Whether Ms. Bessara could start working at two hours or four hours a day was a relevant inquiry because several of the part-time jobs on the labor market survey started at 20 hours a week.

¹⁴Some evidence was presented at the hearing concerning Ms. Bessara's present unwillingness to return to work. However, if a claimant is incapable of performing the suggested suitable alternative employment, the issue of willingness to work need not be addressed. *Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 (1985).

and child care attendant jobs are not suitable.

Neither Dr. McCaffrey nor Dr. Ma would now approve Ms. Bessara accepting a full time position. That restriction eliminates the sales assistant and tele-service or enrollment representative openings.

Of the remaining two job opportunities on the labor market survey, the pet clinic receptionist job did not list a salary, or pay scale, and was “rarely” available. Additionally, the employer was seeking an employee to work 20 hours a week, which is the high end of Dr. Ma’s conflicting presentation of the phased-in re-employment schedule. While Ms. Figueroa expressed her belief that employers offering part-time employment were flexible, the contact information for the pet clinic does not indicate the employer is willing to make an accommodation for phased-in re-employment. For these reasons, I consider the job of pet clinic receptionist unacceptable.

After the above eliminations, the labor market survey contains one remaining job opportunity, a customer service clerk for a AAA Hawaii. Setting aside the issue that this employer required the part-time employee to work 19 to 25 hours a week, this one job opening, standing alone, fails to satisfy the Employer’s burden to present evidence of viable suitable alternative employment in the local community.¹⁵

CONCLUSION

Because Ms. Bessara is unable to return to her former work as a cook, she has established a *prima facie* case of total disability. Based on Dr. McCaffrey’s opinion, Ms. Bessara has additionally proven by the preponderance of the more probative evidence that she is unable to return to any other type of work. Further, in light of both medical opinions in the record, even if Ms. Bessara were capable of some sedentary work, the labor market survey fails to demonstrate suitable alternative employment in the local community and rebut the *prima facie* case. Accordingly, the extent of Ms. Bessara’s permanent disability is total.

ATTORNEY FEE

Section 28 of the Act, 33. U.S.C. § 928, permits the recoupment of a claimant’s attorney’s fees and costs in the event of a “successful prosecution.” Since I have determined an issue in favor of Ms. Bessara, Mr. Birnbaum is entitled to submit a petition to recoup fees and costs associated with his professional work before the Office of Administrative Law. Judges within 30 days of receipt of this Decision and Order. Mr. Kessner has 30 days from receipt of such fee petition to respond.

ORDER

¹⁵See *Lentz v. Cottman*, 852 F.2d 129 (4th Cir. 1988) and *Green v. Suderman Stevedores*, 23 BRBS 389 (1990).

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Employer, NAVY MWR/CONTRACT CLAIMS SERVICES, INC., **SHALL PAY** the Claimant, MS. MARY A. BESSARA, compensation for **PERMANENT, TOTAL DISABILITY**, from July 21, 2002, and continuing, based on an average weekly wage of \$374.75, such compensation to be computed in accordance with Section 8 (a) of the Act, 33 U.S.C. § 908 (a).

2. The Employer, NAVY MWR/CONTRACT CLAIMS SERVICES, INC., **SHALL RECEIVE** credit for all amounts of compensation previously paid to the Claimant, MS. MARY A. BESSARA, since July 21, 2002 as a result of her back injury on January 21, 1997.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: November 20, 2003
Washington, D.C.